

CHAPTER 194**(HB 390)**

AN ACT relating to Title XI of the Kentucky Revised Statutes, making an appropriation therefore and declaring an emergency.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. A NEW SECTION OF KRS CHAPTER 131 IS CREATED TO READ AS FOLLOWS:

As used in this section and Sections 1 to 14 of this Act:

- (1) *"Brand family" means all styles of cigarettes sold under the same trade mark and differentiated from one another by means of additional modifiers or descriptors, including but not limited to menthol, lights, kings, and 100's, and includes any brand name alone or in conjunction with any other word, trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes.*
- (2) *"Distributor" means a person, wherever residing or located, who purchases nontax-paid cigarettes and stores, sells, or otherwise disposes of the cigarettes. This includes resident wholesalers, nonresident wholesalers, and unclassified acquirers as defined in KRS 138.130.*
- (3) *"Nonparticipating manufacturer" means any tobacco product manufacturer that is not a participating manufacturer.*
- (4) *"Participating manufacturer" has the meaning given the term in Section II(jj) of the master settlement agreement and all amendments thereto.*
- (5) *"Stamping agent" means a person, including a distributor, that is authorized to affix tax stamps to packages or other containers or cigarettes pursuant to KRS 138.146 or any person that is required to pay the excise tax imposed pursuant to KRS 138. 155.*
- (6) *"Master settlement agreement" has the same meaning as in KRS 131.600.*
- (7) *"Cigarette" has the same meaning as in KRS 131.600.*
- (8) *"Secretary" means the secretary of the Revenue Cabinet.*
- (9) *"Cabinet" means the Revenue Cabinet.*
- (10) *"Tobacco product manufacturer" has the same meaning as in KRS 131.600.*
- (11) *"Units sold" has the same meaning as in KRS 131.600.*
- (12) *"Qualified escrow fund" has the same meaning as in KRS 131.600.*

SECTION 2. A NEW SECTION OF KRS CHAPTER 131 IS CREATED TO READ AS FOLLOWS:

The General Assembly finds that violations of KRS 131.600 and 131.602 threaten the integrity of the tobacco master settlement agreement, the fiscal soundness of the state, and the public health. The legislature finds that enacting procedural enhancements will aid enforcement of KRS 131.600 and 131.602 and thereby safeguard the master settlement agreement, the fiscal soundness of the state, and the public health.

SECTION 3. A NEW SECTION OF KRS CHAPTER 131 IS CREATED TO READ AS FOLLOWS:

- (1) *Prior to selling cigarettes in Kentucky, directly or through a distributor, retailer, or similar intermediary or intermediaries, every tobacco product manufacturer shall certify as true under penalty of perjury that, as of the date of certification, the tobacco product manufacturer is a participating manufacturer or nonparticipating manufacturer in full compliance with the provisions of KRS 131.602 and Section 9 of this Act. The tobacco product manufacturer shall execute and deliver the certification to the Attorney General on a form prescribed by the Attorney General no later than April 30 of each year.*
- (2) *A participating manufacturer shall include in its certification a list of its brand families. The participating manufacturer shall update the list thirty (30) calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the Attorney General.*
- (3) *A nonparticipating manufacturer shall include in its certification a complete list of all of its brand families and provide the following:*

 - (a) *A separate list of its brand families of cigarettes and the number of units sold for each brand family that were sold in Kentucky during the preceding calendar year; and*
 - (b) *A separate list of all of its brand families that have been sold in Kentucky at any time during the current calendar year including:*

 1. *Indicating by an asterisk any brand family sold in Kentucky during the preceding calendar year that is no longer being sold in Kentucky as of the date of the certification; and*
 2. *Identifying by name and address any other manufacturer of such brand families in the preceding or current calendar year.*
 - (c) *Verification that the nonparticipating manufacturer has provided the following:*

 1. *The name, address, and telephone number of the financial institution where the nonparticipating manufacturer has established a qualified escrow fund required under KRS 131.602 and all regulations promulgated thereunder.*
 2. *The account number of the qualified escrow fund and any subaccount number for the state of Kentucky.*
 3. *The amount the nonparticipating manufacturer placed in the fund for cigarettes sold in Kentucky during the preceding calendar year, the date and amount of each deposit and evidence or verification, as may be deemed necessary, by the Attorney General to confirm the foregoing.*
 4. *The amount and date of any withdrawal or transfer of funds the nonparticipating manufacturer made at any time from the fund or from any other qualified escrow fund into which it ever made escrow payments pursuant to KRS 131. 602 and all administrative regulations promulgated thereto.*
- (4) *In the case of a nonparticipating manufacturer, the certification shall further certify:*

 - (a) *That the nonparticipating manufacturer is registered to do business in Kentucky or has appointed a resident agent for service of process and provided notice as required by Section 6 of this Act.*

- (b) *That the nonparticipating manufacturer has established and continues to maintain a qualified escrow fund pursuant to KRS 131.602 and has executed a qualified escrow agreement that governs the qualified escrow fund and that has been reviewed and approved by the Attorney General.*
 - (c) *That the nonparticipating manufacturer is in full compliance with KRS 131.602, Sections 1 to 14 of this Act, and any administrative regulations promulgated pursuant thereto.*
- (5) *A tobacco product manufacturer may not include a brand family in its certification unless:*
 - (a) *In the case of a participating manufacturer, the participating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of calculating its payments under the master settlement agreement for the relevant year, in the volume and shares determined pursuant to the master settlement agreement.*
 - (b) *In the case of a nonparticipating manufacturer, the nonparticipating manufacturer affirms that the brand family is to be deemed to be its cigarettes pursuant to KRS 131.602.*
- (6) *The nonparticipating manufacturer shall update all lists thirty (30) calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the Attorney General.*
- (7) *Nothing in this section shall be construed as limiting or otherwise affecting the state's right to maintain that a brand family constitutes cigarettes of a different tobacco product manufacturer for purposes of calculating payments under the master settlement agreement or for purposes of KRS 131.602.*
- (8) *The tobacco product manufacturers shall maintain all invoices and documentation of sales and other information relied upon for a certification for a period of five (5) years.*

SECTION 4. A NEW SECTION OF KRS CHAPTER 131 IS CREATED TO READ AS FOLLOWS:

- (1) *The Attorney General shall develop and make available to the cabinet for public inspection, to include publishing on the cabinet's website, a listing of all tobacco product manufacturers that have provided current and accurate certifications pursuant to Section 3 of this Act and all brand families that are listed in the certifications. The listing shall be referred to as the "directory" and completed no later than July 1 of each certification year.*
- (2) *The cabinet shall not include or retain in the directory the name or brand families of any nonparticipating manufacturer that has failed to provide the required certification or whose certification the Attorney General determines is not in compliance with Section 3 of this Act, unless the Attorney General has determined that such violation has been satisfactorily cured.*
- (3) *Neither a tobacco product manufacturer nor a brand family shall be included or retained in the directory if the Attorney General determines in the case of a nonparticipating manufacturer that:*
 - (a) *Any escrow payment required pursuant to KRS 131.602 for any period for any brand family, whether or not listed by the nonparticipating manufacturer, has not*

been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the Attorney General; or

- (b) Any outstanding final judgments, including interest thereon, for a violation of KRS 131.602 has not been fully satisfied for the brand family or the manufacturer.*
- (4) Upon receipt of information from the Attorney General, the cabinet shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the directory in conformity with the requirements of this section and Sections 3 and 9 of this Act. The cabinet shall transmit, by electronic mail or other practicable means, notice to each stamping agent and distributor of any addition to or removal from the directory of any tobacco product manufacturer or brand family.*
- (5) Every stamping agent and distributor shall provide and update as necessary an electronic mail address to the cabinet for the purpose of receiving any notifications that may be required by this section and Sections 3, 7, 9, and 11 of this Act.*
- (6) Notwithstanding the provisions of subsections (2) and (3) of this section, in the case of any nonparticipating manufacturer who has established a qualified escrow account pursuant to KRS 131.602 that has been approved by the Attorney General, the Attorney General may not remove the manufacturer or its brand families from the directory unless the manufacturer has been given at least thirty (30) days' notice of the intended action. For the purposes of this section, notice shall be deemed sufficient if it is sent either electronically to an electronic-mail address or by first class to a postal mailing address, provided by the manufacturer in its most recent certification filed pursuant to Section 3. The notified nonparticipating manufacturer shall have thirty (30) days from receipt of the notice to comply. At the time that the Attorney General sends notice of its intent to remove the manufacturer from the directory the Attorney General shall post the notice in the directory.*

SECTION 5. A NEW SECTION OF KRS CHAPTER 131 IS CREATED TO READ AS FOLLOWS:

It shall be unlawful for any stamping agent or distributor to affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory.

SECTION 6. A NEW SECTION OF KRS CHAPTER 131 IS CREATED TO READ AS FOLLOWS:

- (1) Any nonresident or foreign nonparticipating manufacturer that has not registered to do business in the state as a foreign corporation or business entity shall, as a condition precedent to having its brand families included or retained in the directory, appoint and continually engage without interruption the services of an agent in this state to act as agent for the service of process on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of KRS 131.602 and Sections 1 to 14 of this Act, may be served in any manner authorized by law. The service shall constitute legal and valid service of process on the nonparticipating manufacturer. The nonparticipating manufacturer shall provide the name, address, phone number and proof of the appointment and availability of the agent to the Attorney General.*
- (2) The nonparticipating manufacturer shall provide notice to the Attorney General thirty (30) calendar days prior to termination of the authority of an agent and shall further*

provide proof of the appointment of a new agent no less than five (5) calendar days prior to the termination of an existing agent appointment. If an agent terminates an agency appointment, the nonparticipating manufacturer shall notify the secretary and the Attorney General of the termination within five (5) calendar days and shall include proof of the appointment of a new agent.

- (3) Any nonparticipating manufacturer whose products are sold in this state without appointing or designating an agent as required by this section shall be deemed to have appointed the Secretary of State as its agent and may be proceeded against in courts of this state by service of process upon the Secretary of State. The appointment of the Secretary of State as its agent shall not satisfy the condition precedent to having its brand families listed or retained in the directory.*
- (4) The Attorney General may by administrative regulation establish criteria for validating the appointment of an agent for the purposes of this section.*

SECTION 7. A NEW SECTION OF KRS CHAPTER 131 IS CREATED TO READ AS FOLLOWS:

On or before the twentieth day of each month, each stamping agent and distributor shall submit documentation that the secretary requires to facilitate compliance with this section, including but not limited to a list by brand family of the total number of cigarettes for which the stamping agent or distributor affixed stamps during the previous calendar month or otherwise paid the tax due for the cigarettes. The stamping agent or distributor shall maintain, and make available to the secretary, all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the secretary for a period of five (5) years.

SECTION 8. A NEW SECTION OF KRS CHAPTER 131 IS CREATED TO READ AS FOLLOWS:

- (1) Notwithstanding KRS 131.190, the secretary is authorized to disclose to the Attorney General the name and address of a stamping agent or distributor and the number of sticks by brand name that have been purchased from a nonparticipating manufacturer and have been stamped with Kentucky stamps by that agent or distributor. The Attorney General may share this information with other federal, state, or local agencies only for the purposes of enforcement of KRS 131.602 and Sections 1 to 14 of this Act or corresponding laws of other states. The Attorney General is further authorized to disclose to a nonparticipating tobacco product manufacturer this information that has been provided by a stamping agent regarding the purchases from that manufacturer. This information provided by a stamping agent may be used in any enforcement action against the nonparticipating manufacturer by the Attorney General.*
- (2) In addition to the information required to be submitted pursuant to Sections 3, 6, and 9 of this Act, the Attorney General or the secretary may require a stamping agent, distributor, or tobacco product manufacturer to submit any additional information including but not limited to samples of the packaging or labeling of each brand family as is necessary to enable the Attorney General to determine whether a tobacco product manufacturer is in compliance with Sections 1 to 14 of this Act.*

SECTION 9. A NEW SECTION OF KRS CHAPTER 131 IS CREATED TO READ AS FOLLOWS:

The Attorney General may, at any time, require from the nonparticipating manufacturer proof from the financial institution in which the manufacturer has established a qualified escrow fund, for the purpose of compliance with KRS 131.600 and 131.602, of the amount of money in the fund, exclusive of interest, the amount and date of each deposit to the fund, and the amount and date of each withdrawal from the fund.

SECTION 10. A NEW SECTION OF KRS CHAPTER 131 IS CREATED TO READ AS FOLLOWS:

- (1) Any cigarettes that have been affixed with a stamp in this state in violation of Section 5 of this Act shall be deemed contraband and subject to seizure and forfeiture pursuant to KRS 138.165. Cigarettes seized in accordance with this section shall be destroyed and not resold.*
- (2) The Attorney General may seek an injunction to restrain a violation of Section 5 or 7 of this Act by a distributor or stamping agent and to compel the distributor or stamping agent to comply with Sections 5 and 7 of this Act. In any action brought pursuant to this section, the state shall be entitled to recover the costs of investigation, costs of the action, and reasonable attorney fees from any distributor or stamping agent found to be in violation of Section 5 or 7 of this Act.*
- (3) No stamping agent or distributor shall sell or distribute cigarettes, or acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the stamping agent knows are intended for distribution or sale in the state in violation of Section 5 of this Act. A violation of this section is a class A misdemeanor.*
- (4) Nothing in this section shall prohibit a stamping agent or distributor from possessing unstamped containers of cigarettes held in inventory for delivery to, or for sale in, another state.*
- (5) In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a stamping agent or distributor has violated Section 5 of this Act or any regulation adopted pursuant to Sections 1 to 14 of this Act, the secretary may suspend the sale of cigarette stamps to the stamping agent or distributor for failure to comply with the provisions of Sections 1 to 14 of this Act.*

SECTION 11. A NEW SECTION OF KRS CHAPTER 131 IS CREATED TO READ AS FOLLOWS:

- (1) Any person aggrieved by a determination of the Attorney General to not include or to remove from the directory created in Section 4 of this Act a brand family or tobacco product manufacturer may appeal the determination to the Franklin Circuit Court, or to the Circuit Court of the county in which the aggrieved party resides or conducts his place of business. For the purposes of a temporary injunction sought pursuant to this subsection, loss of the ability to sell tobacco products as a result of removal from the directory may be deemed to constitute irreparable harm.*
- (2) No person shall be issued a license or granted a renewal of a license to act as a distributor or stamping agent unless the person is in compliance with the provisions of Sections 1 to 14 of this Act.*
- (3) The Attorney General or the cabinet may promulgate administrative regulations necessary to effect the purposes of Sections 1 to 14 of this Act.*

SECTION 12. A NEW SECTION OF KRS CHAPTER 131 IS CREATED TO READ AS FOLLOWS:

- (1) *In any action brought by the state to enforce Sections 1 to 14 of this Act, the state shall be entitled to recover the costs of investigation, expert witness fees, costs of the action, and reasonable attorney fees from any entity or person found to be in violation of Sections 1 to 14 of this Act.*
- (2) *If a court determines that a person has violated Sections 1 to 14 of this Act, the court shall order any profits, gain, gross receipts, or other benefit from the violation to be relinquished and paid to the State Treasurer for deposit in the Tobacco Control Special Fund, which is hereby created. Moneys in the fund shall be used for the sole purpose of enforcement of Sections 1 to 14 of this Act. Unless otherwise expressly provided, the remedies or penalties provided by Sections 1 to 14 of this Act are cumulative to each other and to the remedies or penalties available under all other laws of this state.*

SECTION 13. A NEW SECTION OF KRS CHAPTER 131 IS CREATED TO READ AS FOLLOWS:

If any section, subsection, subdivision, paragraph, sentence, clause, or phrase of KRS 131.600, 131.602, or Sections 1 to 14 of this Act causes KRS 131.600 and 131.602 to no longer constitute a model statute, as it is set out in Exhibit T to the master settlement agreement, then that portion of KRS 131.600, 131.602, or Sections 1 to 14 of this Act shall not be valid.

SECTION 14. A NEW SECTION OF KRS CHAPTER 131 IS CREATED TO READ AS FOLLOWS:

- (1) *In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a stamping agent or distributor has violated any provision of Sections 1 to 14 of this Act or any administrative regulation promulgated thereunder, the secretary may revoke or suspend the license of any stamping agent or distributor pursuant to KRS 138.195 and 138.205.*
- (2) *Each stamp affixed in violation of Section 5 of this Act shall constitute a separate violation. The secretary may impose a civil penalty in an amount not to exceed the greater of five hundred percent (500%) of the retail value of the cigarettes sold or five thousand dollars (\$5,000) upon a determination of a violation of Section 5 of this Act or any administrative regulations promulgated thereunder. The penalty shall be imposed in the manner provided by KRS 138.195 and 138.205.*

~~SECTION 15. A NEW SECTION OF KRS CHAPTER 136 IS CREATED TO READ AS FOLLOWS:~~

- ~~(1) Notwithstanding KRS 136.070, a corporation that holds directly or indirectly stock or securities in other corporations equal to or greater than fifty percent (50%) of its total assets may, at the option of the taxpayer, compute capital employed in the business using one of the following options:~~
 - ~~(a) The corporation and its subsidiaries may file a consolidated license tax return which computes capital employed by the business under KRS 136.070(2) and (3) and includes the parent corporation and all subsidiary corporations in which the parent corporation owns more than fifty percent (50%) of the outstanding stock. The consolidated capital of the parent corporation and its subsidiaries shall be increased by an amount equal to ten percent (10%) of the difference between the~~

~~total capital employed as apportioned to Kentucky if the parent corporation and each taxable subsidiary filed a separate license tax return, and the total capital apportioned to Kentucky computed on a consolidated basis; or~~

~~(b) The corporation may file a separate license tax return and deduct from its capital, determined in accordance with KRS 136.070(2), the book value of its investment in the stock and securities of any corporation in which it owes more than fifty percent (50%) of the outstanding stock. The capital of the corporation shall be increased by an amount equal to ten percent (10%) of the difference between total capital apportioned to Kentucky without the deduction provided by this paragraph, and the total capital apportioned to Kentucky computed with the deduction provided by this paragraph.~~

~~(2) For purposes of determining the ratio of stock and securities to total assets, the value shall be the value of the accounts as reflected on financial statements prepared for book purposes as of the last day of the calendar or fiscal year. The term "stock and securities" as used in this section means shares of stock in any corporation, certificates of stock or interest in any corporation, notes, bonds, debentures, and evidences of indebtedness. The term "book value" means the value as shown on financial statements prepared for book purposes as of the last day of the calendar or fiscal year.]~~

Section 16. For the year 2003, the certifications by a tobacco product manufacturer described in Section 3 of this Act shall be due forty-five (45) calendar days after the effective date; and the directory described in Section 4 of this Act shall be published or made available within ninety (90) calendar days after such effective date.

Section 17. There is appropriated to the Revenue Cabinet, before making distributions from the tobacco settlement agreement fund pursuant to KRS 248.654, for each year of the 2002-2004 biennium, and notwithstanding the temporary emergency expenditures of state funds in Executive Order 2002-727, one hundred seventy-five thousand (\$175,000) dollars to carry out the provisions of KRS 131.600, 131.602, and Sections 1 to 14 of this Act.

~~[Section 18. The provisions of Section 15 of this Act shall be effective for tax periods for which a corporation license tax return is due, without regard to extension, on or after April 15, 2004. The provisions of Section 15 of this Act shall not apply to any tax period for which a corporation license tax return is due, without regard to extension, on or after April 15, 2005.]~~

Section 19. The following KRS section is repealed:

~~136.071 Corporation license tax — Apportionment of capital when corporation holds stock in other corporations.]~~

Section 20. Whereas the General Assembly is dedicated to protecting Kentucky's receipt of funds under the Master Settlement Agreement, an emergency is declared to exist, and the provisions of Sections 1 through 14 and Sections 16 and 17 of this Act take effect upon its passage and approval by the Governor or upon its otherwise becoming law.

Vetoed in part, April 3, 2003. Became law April 6, 2003, without Governor's signature.